Filed 5/17/10 In re J.J. CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re J.J., a Person Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES, Plaintiff and Respondent, v. JASMINE C., Defendant and Appellant.	A125951 A127019 (Alameda County Super. Ct. No. OJ09011853)

The two-month-old daughter (J.J.) of Jasmine C. (Mother) was removed from Mother's care due to her continuing substance abuse and mental health issues. Mother's parental rights to an older child had previously been terminated, and the juvenile court denied her reunification services in this case because she had failed to make reasonable efforts to treat the problems that led to the prior dependency proceeding. A permanency planning hearing was scheduled for J.J., and Mother filed two separate petitions asking the court to grant her reunification services and seeking modification of the disposition order. In these appeals, which we have ordered consolidated, we affirm the juvenile court's denial of those petitions and the termination of Mother's parental rights.

I. BACKGROUND

In February 2009, Mother was living with her two-month-old daughter J.J. (born December 2008) and Mother's nephew, Travon T., in the apartment of J.J.'s recently deceased maternal grandmother in Oakland. On or about February 7, 2009, Travon told his mother (Crystal T., Mother's sister) that Mother was acting strangely. Crystal called Oakland police to report that Mother might be having a breakdown. Crystal reported that Mother had admitted using crack cocaine on February 5 and had left J.J. in the care of a relative on February 6. Mother had been diagnosed with bipolar disorder and had not taken her prescribed medications for more than one year. Recently, Mother had an altercation with J.J.'s father's girlfriend that led to law enforcement intervention, and her landlord had asked her to move.

On February 7, 2009, an emergency response child welfare worker visited the apartment, which was extremely crowded with furniture,[1] and took J.J. into protective custody. On February 9, 2009, Alameda County Social Services (Agency) filed a petition alleging that J.J. was a juvenile dependent within the meaning of Welfare and Institutions Code section 300, subdivisions (b) and (g).[2] The petition alleged that Mother was unable to care for J.J. due to mental illness or substance abuse. Specifically, Mother had a history of violent behavior, untreated substance abuse, arrests, and convictions. She had been diagnosed with bipolar disorder and prescribed psychotropic medications. She admitted using crack cocaine on February 5 and, on February 6, she reported hearing voices and threatened to harm J.J. and herself. J.J. was left without any provision for support when Mother was placed on a psychiatric hold pursuant to section 5150. The father's whereabouts were unknown. On February 10, 2009, the court ordered J.J. detained.

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[1] Travon told the child welfare worker the apartment was cluttered because he was in the process of moving. The landlord had asked Mother to leave because she was on parole. Travon said he had taken care of J.J. while Mother was having difficulty. He claimed that Mother was "drug-free" and that J.J. had been born drug-free.

[2] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

February 2009 Jurisdiction and Disposition Report

The February 26, 2009 jurisdiction/disposition report disclosed that Mother had a criminal history: a 1991 juvenile disposition for transport or sale of a controlled substance; eight misdemeanor convictions from 1995 to 1999 for petty and grand theft, false identification, and driving with a suspended license; a 2000 conviction for possession, manufacture or sale of deadly weapons; a 2003 charge of theft with priors in Sacramento; and a 2005 conviction for vehicle theft, which led to a prison sentence. On February 15, 2009, Mother was arrested for assault with a deadly weapon (not a firearm) and violation of parole, and she was being held in Santa Rita Jail.

Mother also had a child dependency history. In 1994, when Mother's oldest child, A.D., was four years old, Mother was referred to child welfare authorities for sexual abuse, but the disposition was unknown.[3] When Mother's second child, J.W., was born in March 2000, he tested positive for cocaine. He was adjudged a dependent child and Mother was offered family maintenance services. In March 2000, Mother was referred for severe neglect and the referral was sustained. (The record does not indicate whether this referral was based on J.W.'s being born with cocaine in his system or on different grounds.) A November 2000 referral for general neglect was also sustained.[4] In March 2001, family reunification services were ordered for Mother with respect to J.W., indicating he had been removed from her care. In a later report, the Agency wrote that a March 26, 2001 petition for J.W. was sustained based on allegations under section 300, subdivisions (b) and (g) (failure to protect and provide support) and J.W. was removed "due to [Mother's] incapacity and absence as well as her substance abuse problem" that she failed to resolve. Family reunification services as to J.W. were terminated in September 2001. Mother's parental rights were terminated in February 2002, but that decision was reversed on appeal. In May 2003, reunification

[3] A referral for physical abuse in April 2006, when A.D. was 16 years old, was deemed inconclusive.

[4] A January 2001 referral for physical abuse was "evaluate[d] out."

services were again terminated. Mother's parental rights were terminated in December 2004, and J.W. was adopted.

The Agency recommended denial of reunification services under section 361.5. "The mother is not available at this time and has not been in contact with the Agency or this Worker. The Undersigned's attempts to reach the mother's sister and nephew have been fruitless. Consequently, it seems advisable at this time to not offer reunification services to the mother, who has been arrested for serious charges, including violation of her parole in another county." J.J. was doing well in foster care.

At the February 26, 2009 jurisdiction and disposition hearing, the public defender declared a conflict in its representation of Mother and the court appointed new counsel. The matter was continued to March 12, 2009. At the March 12, 2009 hearing, Mother appeared with counsel and a contested hearing was scheduled for April 30.

April 2009 Amended Petition and Addendum to Jurisdiction and Disposition Report

On April 27, 2009, the Agency filed an amended petition, which added allegations under section 300, subdivision (j) (abuse of sibling) that Mother had failed to reunify with J.W. In an addendum report filed April 29, the Agency again recommended denial of services. The report provided the following additional background information.

Mother's discharge report following her psychiatric confinement from February 7 to 9, 2009, included a diagnosis of bipolar disorder, obsessive compulsive disorder, cocaine abuse, and history of posttraumatic stress disorder.[5] She was given Zoloft, Remeron and Seroquel on her release.

Mother was arrested on February 15, 2009. A police report stated that Mother attempted to stab Travon with a knife while he was moving items out of the maternal grandmother's apartment. " '[Mother] began acting strange and pacing around.' '[Mother] came into the room and grabbed [Travon] from behind with her right arm around his neck. [Travon] felt something sharp on his neck and pushed her arm back.

[5] Mother had apparently, at some unidentified time prior, and under circumstances not set forth in the record, been shot twice in the chest by police.

He noticed in [Mother's] right hand she was holding a 6" sharp object with a silver blade, which had paint specks on it, and a black handle (a spackle tool). [Travon] pushed [Mother] back and grabbed her wrists so she couldn't cut him. [Travon] and his friend . . . struggled with [Mother] and were able to push her out of the room. [The friend] closed the door and locked it, while he was calling the police.'

"When Travon . . . came out of the room a short time later, he discovered that the burgundy Cadillac the mother had been driving was gone, along with his house keys and his cell phone as well as the spackle tool. . . . A few hours later on the same date . . . [Mother] was back on the scene[] . . . [and] was arrested. The mother stated at that time that she had been drinking alcohol and smoking marijuana earlier that day and did not remember the earlier incident. She also stated that she had not taken the medication that was prescribed to her from John George psychiatric facility a few days prior. . . . [Mother] was making spontaneous statements, such as that she left earlier because she was 'seeing spirits' and she was 'scared and confused.' She also stated that she would never hurt [Travon] because she asks him for help when 'airplanes and headlights follow her.' " Mother was taken to a psychiatric facility for evaluation. Her discharge report from that facility indicated diagnoses for bipolar affective disorder, alcohol dependence, and THC abuse. She was released with prescribed Depakote, Zoloft, and Remeron.

On March 31, 2009, Mother called the Agency child welfare worker and said she had been released from jail. She requested visits with J.J. A visit took place on April 3, 2009, and went well, but thereafter Mother's phone was disconnected, she did not show up for the next weekly visit on April 10, and she did not contact the child welfare worker. The child welfare worker later learned that Mother had been reincarcerated.

Travon and a friend of Mother's each requested placement of J.J. A "TDM" was held on April 21, 2009, and "[i]t was decided that the maternal great aunt, [M.M.], would be the relative that would provide the most stability . . . for a long term placement for the minor." The Agency was still in the process of approving M.M.'s home as a placement.

April 30, 2009 Jurisdiction and Disposition Hearing

At the April 30, 2009 jurisdiction and disposition hearing, the Agency orally amended the April 27 amended petition to delete the allegations that Mother admitted to using crack cocaine on February 5, that Mother was currently on parole, and that J.J. was left without provision for support when Mother was taken into custody for psychiatric evaluation on February 6. An allegation was added that Mother was incarcerated. (§ 300, subd. (g).) The Agency also amended its jurisdiction and disposition report to recommend denial of services pursuant to section 361.5, subdivision (b)(11) in addition to subdivision (b)(10).[6]

Mother, who was represented by counsel, concurred in the changes to both the petition and the recommended disposition, and raised no objections and made no other representations or statements regarding the matter. Mother's counsel made a comment indicating she anticipated that Mother would be in prison at the time of the scheduled section 366.26 permanency hearing. The court then sustained the petition and adopted the recommended disposition. The court found clear and convincing evidence that J.J. needed to be removed from Mother's custody based on Mother's history of substance abuse, mental health problems, and violence and her then-current incarceration. The court found that Mother's reunification services and parental rights to a sibling had been

[6] "Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (10) That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian. [¶] (11) That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent." (§ 361.5, subd. (b)(10), (11).)

terminated and she had not made a reasonable effort to treat the problems that led to that child's removal. The court set a section 366.26 hearing for August 4, 2009, and advised Mother of her right to contest the order by writ petition. Mother did not file a writ petition.

On May 29, 2009, J.J. was placed in M.M.'s home and the change of placement was approved on June 5.

July 2009 § 388 Petition

On July 10, 2009, Mother filed a section 388 petition to modify the disposition order and grant Mother reunification services. As changed circumstances, the petition alleged, "At [the time of the jurisdiction/disposition hearing], the mother was incarcerated with a pending parole violation. However, she was paroled to the community in early June, and is currently residing at Orchid Women's Recovery Center where she would be able to have her baby placed with her should the court set aside its decision, and give the mother six months of reunification services." Explaining why the change would be in the best interest of J.J., the petition explained, "[Mother] has consistently maintained that she wants to raise her baby, and is now mentally stable and emotionally ready to do so. This baby, although placed with a maternal cousin, would benefit most from a primary relationship with her birth mother." The court scheduled a hearing on the petition, which was later continued to August 4, 2009, the same date as the section 366.26 hearing.

July 2009 Section 366.26 Report

The Agency's report for the August 4, 2009 section 366.26 hearing was filed on July 29, 2009 and confirmed that Mother had been released from jail on June 17 and had enrolled in Orchid Women's Recovery Center (Orchid) on July 7. Mother visited J.J. on July 9 and 23 and for the most part was appropriate and engaging. J.J. was doing well in the care of a maternal relative (name withheld, presumably M.M.) who wanted to adopt J.J. and who maintained contact between J.J. and Crystal and a first cousin (presumably Travon). The caretaker had visited J.J. three times a week for one month at the former foster home before J.J. was placed with her, she had raised three children, and she had a

background in early child development. Because notice by publication to the alleged father (who could not be located) was delayed, the Agency asked that the section 366.26 hearing be postponed to allow for a 75-day notice period.

August 2009 Hearing on Section 388 Petition

At the August 4, 2009 hearing, the court first granted the Agency's request to continue the section 366.26 hearing to October 29. As discussed in further detail *post*, Mother then presented evidence in support of her section 388 petition.

The court denied the petition. "Right now there is no evidence that this child's best interest would be provided for by . . . restoring parental reunification. . . . [¶] Based on the evidence provided, [Mother] is progressing but right now she is in the early stages of recovery . . . . [¶] . . . However, as this matter progresses, the Court can re-consider a new 388 petition." The court ordered visitation between J.J. and Mother at Orchid, and continued the section 366.26 hearing to October 29, 2009. Mother appealed from the denial of her petition (*In re Ja'liyah J.*, Appeal No. A125951).

Status Reports September and October 2009

According to a status review report filed September 25, 2009, Mother continued to visit J.J. every other week for one hour and, on the whole, was appropriate and engaging. At a supervised visit at Orchid, J.J. focused her attention on others around her rather than on Mother and was quiet. Orchid staff told the child welfare worker that Mother was doing great and should have her child placed with her. However, Mother informed the Agency on September 22 that she had been discharged from Orchid for bringing a male companion to a meeting, which was a violation of house rules. She reported that Orchid helped her enroll in another drug treatment program. J.J. was thriving in her temporary placement and had a healthy attachment to her relative caregiver.

In a section 366.26 report filed October 15, 2009, the Agency recommended termination of parental rights and adoption as a permanent plan. The relative caregiver planned to adopt J.J. The Agency reported that it had attempted to schedule a visit with Mother on October 8, but the director of the new program prohibited the visit because Mother had violated house rules. A visit took place October 14.

Section 388 Petition filed October 22, 2009

On October 22, 2009, Mother filed a second section 388 petition seeking six months of reunification services or, in the alternative, placement of J.J. with her in a mother-infant program. She had been offered a bed in such a program (Solid Foundation) if the court authorized the placement.

October 29, 2009 Hearing

At the October 29, 2009 hearing, Mother was not present and her counsel requested a continuance of the hearing on the 366.26 permanency determination, noting also that "There should be a new 388 petition as part of the file." She reported that Mother had been remanded into custody in her criminal matter because she had not informed the court that she had changed treatment programs. She had a criminal court date scheduled for December 1, and her attorney asked the court to continue the matter to a date after December 1 so "I will know whether we can go forward on the 388 or not." Counsel also stated that "If she continues in custody, then I won't argue the 388. At that time we will know whether she has a viable position." After hearing argument from the parties, the court continued the hearing to November 12, 2009, saying it would consider all of the parties' arguments at that time, and "[t]he issue that is raised in this 388 petition will be addressed at that time."

November 12, 2009 Hearing

At the November 12, 2009 hearing, the court denied Mother's request for a further continuance and denied the section 388 petition without holding an evidentiary hearing. Mother then offered "a stipulation as to the .26 matter. . . . I would just make a brief . . . statement as to what the mother would testify to had she taken the stand. [¶] . . . [¶] [She] does object to the termination of her parental rights. She very much wants to reunify with her child. She's opposed to any plan of adoption; and if the Court were to consider legal guardianship, she would ask that [J.J.] be placed with her sister . . . ." The Agency and minor's counsel said they would accept that stipulation. The court adopted the Agency's recommendations and terminated Mother's parental rights. Mother appealed the order (*In re Ja'liyah J.*, Appeal No. A127019).

II. DISCUSSION

A. Appeal No. 125951

Mother's first appeal challenges the juvenile court's August 4, 2009 denial of her July 10 section 388 petition.

1. *Appealability*

The Agency argues section 366.26, subdivision (*l*)[7] precludes review of the section 388 order on appeal because reversal of the order would require vacation of the order

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[7] Section 366.26, subdivision (*l*) provides:

"(1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following apply:

"(A) A petition for extraordinary writ review was filed in a timely manner.

"(B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record.

"(C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits.

"(2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged, or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section.

"(3) The Judicial Council shall adopt rules of court, effective January 1, 1995, to ensure all of the following:

"(A) A trial court, after issuance of an order directing a hearing pursuant to this section be held, shall advise all parties of the requirement of filing a petition for extraordinary writ review as set forth in this subdivision in order to preserve any right to appeal in these issues. This notice shall be made orally to a party if the party is present at the time of the making of the order or by first-class mail by the clerk of the court to the last known address of a party not present at the time of the making of the order.

"(B) The prompt transmittal of the records from the trial court to the appellate court.

"(C) That adequate time requirements for counsel and court personnel exist to implement the objective of this subdivision.

"(D) That the parent or guardian, or their trial counsel or other counsel, is charged with the responsibility of filing a petition for extraordinary writ relief pursuant to this subdivision.

"(4) The intent of this subdivision is to do both of the following:

"(A) Make every reasonable attempt to achieve a substantive and meritorious review by the appellate court within the time specified in Sections 366.21, 366.22, and 366.25 for holding a hearing pursuant to this section.

setting the section 366.26 hearing (referral order) and Mother did not file a writ petition as required by section 366.26, subdivision (*l*)(l). The Agency cites *In re Rashad B.*, which holds, "[C]ontentions designed to overturn a referral order are not cognizable on appeal unless writ review was sought, even if the contention relates only to contemporaneous orders which would otherwise be appealable. [Citations.]" (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 447–448.) Here, the section 388 order was issued months after the referral order was made, and thus was not contemporaneous with the referral order. By its very nature, the issue of changed circumstances arose after the referral order and would not have been part of the review of that order on a writ petition. The authorities on which the Department relies do not call for a different result. In those cases, the issues on which review was precluded arose at the time of the referral orders or earlier. (See *id.* at pp. 446–447; *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1021–1023; *In re Charmice G.* (1998) 66 Cal.App.4th 659, 662, 671.)

2. *Merits*

A parent "may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court previously made . . . ." (§ 388, subd. (a).) "If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ." (§ 388, subd. (d).) "The court may deny the petition ex parte if: [¶] . . . the petition fails to state a change of circumstance or new evidence that may require a change of order . . . or, that the requested modification would promote the best interest of the child." (Cal. Rules of Court, rule 5.570(d)(1) [regarding denial of hearing on 388 petition].)[8] "A petition for modification must be liberally construed in favor of its sufficiency. . . ." (Rule 5.570(a).) If a hearing is held, the party that brings the petition bears the burden of

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"(B) Encourage the appellate court to determine all writ petitions filed pursuant to this subdivision on their merits.

"(5) This subdivision shall only apply to cases in which an order to set a hearing pursuant to this section is issued on or after January 1, 1995."

[8] All rule references are to the California Rules of Court.

persuasion. (Rule 5.570(h)(1).) The juvenile court's ruling on the petition is reviewed for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

A section 388 petition seeking reunification services after a section 366.26 hearing has been set plays a special role in the dependency scheme. "Once reunification services are ordered terminated, the focus shifts [from family reunification] to the needs of the child for permanency and stability. . . . The burden thereafter is on the parent to prove changed circumstances pursuant to section 388 to revive the reunification issue. Section 388 provides [an] 'escape mechanism' . . . to allow the court to consider new information" and "to accommodate the possibility that circumstances may change after the reunification period that may justify a change in a prior reunification order." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Shifting the burden of persuasion to the parent at this stage of the process does not offend due process because the section 388 procedure "is not unduly burdensome. Such petitions are to be liberally construed in favor of granting a hearing to consider the parent's request. [Citations.] The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]" (*Id.* at pp. 309–310.)

To prevail on a section 388 petition seeking services after the setting of a section 366.26 hearing, a parent must show not only that circumstances have changed since the challenged order was made, but also that a modification of the order would be in the child's best interests. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526 & fn. 5, 529.) To determine the child's best interests, the court must consider: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*Id.* at p. 532, italics omitted.)

a. Evidentiary Hearing

The court held an evidentiary hearing on Mother's July 10, 2009 petition. At the August 4 hearing, Mother testified, "At the time when my baby was taken away from me,

I was going through losing my mother. I lost my apartment. . . . [T]he locks were changed on me when [J.J.] was two weeks old because I was not to get on the lease because of my background." Her mother "didn't have insurance, so I spent all of my money on her funeral." She relapsed in February and started using crack cocaine after three and one half years of abstinence.

At the time of the jurisdiction and disposition hearing, Mother was incarcerated at Santa Rita Jail. When she was released March 30, she went to her father's house, but he could not take her in because he was moving. She stayed at a friend's house for a couple of days but had to leave. She was reincarcerated April 11 because of a new petty theft charge. "Again, I was having homeless problems and money problems, and I made a wrong decision . . . ." She did not see J.J. while she was incarcerated.

When Mother was again released from jail in May, she went to Caleb Outreach, a transitional housing program that offered a sober living environment but no services. She contacted the child welfare worker and visited with J.J. at Caleb Outreach. After three weeks, on July 7, she transferred to Orchid. Mother described Orchid as a parental residential program lasting six to 12 months that includes parenting and anger management classes, Alcoholics and Narcotics Anonymous support groups, nutrition and HIV counseling, and a "feelings group" that addressed issues of bipolar disorder and depression. She was actively participating in all of the programs offered to her and had been promoted to recreation coordinator and self-esteem motivator.[9] She chose Orchid because it allows babies to stay with their mothers. Her then-current visitation schedule with J.J. was every other week for one hour, but she had asked for additional visits every Friday for an hour and every other Saturday for three hours, consistent with Orchid's program. J.J. was very happy to see Mother during the visits and showed she recognized Mother.

[9] As self-esteem motivator, Mother did other women's hair and eyebrows on Self-Esteem Fridays and wrote petitions for the residents to go on outings.

Cynthia D. Lloyd, a certified alcohol and drug counselor at Orchid with 14 years of experience, testified on Mother's behalf. She described Mother as "very willing to participate, eager to learn about her disease." She explained that Orchid's focus was on drug recovery, and if a resident had mental health issues they were referred to other places for help with those issues. "We are [a] dual diagnosis [program], but we are not, say, professionals who are able to diagnose." Orchid had provided Mother with referrals and she was participating fully in the program. Mother testified that she had been diagnosed with depression bipolar, borderline bipolar, insomnia, and post-traumatic stress disorder. She was seeing a psychiatrist outside Orchid once a month for 15 minutes to an hour to discuss how she was doing with her medication, but she was not seeing a psychotherapist because she could not get MediCal to pay for one. She spoke to an individual counselor at Orchid once a week.

Mother testified that she was requesting reunification services because "now I am stable." She testified that she was clean and sober and had been taking her psychotropic medications since February. She was committed to staying with and fully participating in the Orchid program for a year and staying on her medications. "I am in a program and receiving help [which] is something that I have never tried, and it is working for me and I do believe that I am a better person today[.] [J.J.] is my daughter, and I would love to reunify with her and have her back into my custody." She sought reunification services and increased visitation, followed by placement of J.J. with her in Orchid at some point in the future.

After discussing the stresses that led to her relapse in February, Mother testified that if she faced similar stresses in the future, she would know whom to call for help. "I have tools and I have a sponsor. I have a lot more resources than I did then . . . . I have a lot more help now than I did then," including not only the Orchid staff but also J.J.'s godmother and a church she was attending every Sunday. This was the first time she had been in drug treatment since she started smoking crack cocaine 13 years previously.

Mother's counsel argued that Mother had established a change in circumstances because at the time of the jurisdiction and disposition hearing she was incarcerated and

facing the possibility of a "longer" sentence. "Certainly there was no information before the Court at that time that she would be released; and while I objected to the bypass,[10] we did submit . . . with changes in the language to reflect the fact that the mother was still incarcerated." Mother stayed in touch with her attorney and with the Agency following her two releases and "she has indicated all along that she wishes to reunify with her daughter. She continues to ask for increased visitation. She's in a program that is considered quite good. . . . Orchid is a program the Agency has worked with for many, many years." Mother "is capable of being a good parent. There has been no testimony to the contrary. She was bonded with her child prior to losing her to Social Services." Moreover, Mother "was successful in maintaining sobriety for three and a half years before she relapsed and she has been clean since her last relapse. Relapses are very common . . . for drug addicts . . . . I do believe that given her age and her commitment to her recovery and the fact that she is on medication that she is managing her mental health issues."

The Agency argued the change of circumstances consisted of efforts that "are very recent and she is in the very early stages of recovery. She's been in the program less than 30 days and she has a history of 13 years of drug addiction. She testified that this is the first time she has sought treatment. She has a history of arrests[] . . . [including] April of this year. She has a history of mental health issues. [¶] . . . [S]he is still in the very early stages of addressing her mental health issues. She's not in therapy yet. . . . [¶] Case law . . . directs courts to focus at this stage in a case on the permanence and continuity and stability for the minor." Minor's counsel made very similar arguments.

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[10] Counsel's statement that she objected to the bypass of reunification services is not supported by the record. At the April 30, 2009 jurisdiction/disposition hearing, Mother's counsel and the Agency agreed to amendments to the amended petition and to the recommendations in the Agency's jurisdiction/disposition report, which included recommendations that service be denied pursuant to section 361.5, subdivision (b)(10), (11). The court then asked, "Do the parties have any other representations or statements they wish to make with respect to the matter before this Court?" and Mother's counsel responded, "No." The court proceeded to make its rulings.

b. Analysis

The trial court did not abuse its discretion in denying Mother's July 10, 2009 section 388 petition. Mother established the following changed circumstances: she was no longer incarcerated, she was testing negative for drug use, she was taking her prescribed psychotropic medications, and she was participating in drug treatment and related services. We do not belittle these developments, which represent a substantial effort to treat the problems that led to J.J.'s dependency and apparently to the termination of her parental rights to her older child, J.W. However, these developments represent *changing* rather than changed circumstances of the sort that would justify vacating an order setting a section 366.26 hearing.

As noted, once reunification services have been denied or terminated, the focus of the dependency proceeding shifts from reunifying the family to providing permanence and stability to the child. (*In re Marilyn H., supra,* 5 Cal.4th at p. 309.) Moreover, at all stages of the dependency process, the emphasis on prompt resolution of the proceedings is greatest when the dependent child is under age of three years at the time of removal. (Compare § 361.5, subd. (a)(1)(A) with § 361.5, subd. (a)(1)(B).) "A petition which alleges merely *changing* circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47, italics added.)

Mother had been enrolled in Orchid for less than a month. Her substance abuse and mental health problems were chronic and serious: 13 years of crack cocaine use, and multiple mental health diagnoses requiring multiple prescription treatments. Only four years before J.J. was born, she received family maintenance services and two rounds of family reunification services for her older son, J.W., and still lost her parental rights to that child. At the April 30, 2009 jurisdiction and disposition hearing, she did not contest the court's finding that, after losing her parental rights to J.W., she did "not subsequently ma[k]e a reasonable effort to treat the problems that led to removal of [J.W.]" (§ 361.5,

subd. (b)(10), (11).) Significantly, Mother did not specifically discuss what problems led to the termination of her parental rights to J.W. or what reasonable efforts she had taken to overcome those problems.

Although Mother's counsel attempted to characterize the February 2009 incidents as a temporary relapse under extraordinary stress from a lengthy period of sobriety, Mother produced no corroborating evidence of her claimed three-and-one-half period of abstinence. Further, Mother did not discuss or describe her mental health issues in any detail at the section 388 hearing, and she did not demonstrate that she was adequately treating those issues. Mother did not discuss the mental health symptoms she experienced on February 6, 2009, leading up to her involuntary detention and J.J.'s removal, and she did not discuss her February 15, 2009 arrest, which apparently involved delusions and a violent attack on her cousin. She did not describe her history of mental illness or testify that medication alone had enabled her to control her symptoms or behavior over long periods of time. She did not provide a psychological evaluation or psychiatric opinion about appropriate treatment. Lloyd, Orchid's alcohol and drug counselor, was not able to diagnose mental illness and her testimony suggested that the program lacked expertise in mental health treatment. The court was free to draw a negative inference from Mother's failure to substantially address this significant source of problems that led to J.J.'s removal and to give this matter great weight in light of Mother's recent violent or threatening behavior linked to her mental instability.

On J.J.'s best interests, the court could easily conclude on the foregoing evidence that Mother's problems were serious and chronic and would require significant effort and time to overcome even with the support of the Orchid program and psychiatric medication. Especially given J.J.'s young age, the court could reasonably conclude that these changing circumstances were insufficient grounds to further delay a permanent plan for the child. Although Mother's visits with J.J. went well, supporting an inference of a bond between the two, J.J. was also bonded with her relative caretaker, who was able provide permanence and stability for J.J. without significant delay. Nothing in the record

suggests that J.J. experienced distress upon separating from Mother or upon missing a visit with Mother.

In sum, the court did not abuse its discretion in denying the petition. Notably, the court invited Mother to file a new section 388 petition if her situation continued to improve prior to the rescheduled section 366.26 hearing.

B. Appeal No. 127019

By the time Mother filed her second section 388 petition, on October 22, 2009, she had been expelled from Orchid for violating house rules, but had enrolled in a new program.

Her second section 388 petition (submitted on Judicial Council Forms, form JV-180) cited the following changed circumstances: Mother was no longer incarcerated; she was enrolled in a state-licensed 18-month residential treatment program (Wistar R and R Program); she was participating in daily relapse prevention, anger management and 12-step classes, as well as weekly counseling and therapy; she was complying with her medication regimen; she was testing negative for drugs; and she was visiting regularly with J.J., who was "clearly bonded to her." As an attachment to the petition, Mother submitted a letter from the Wistar R and R director, Tina Wilson-Avila, who wrote, "[Mother] has made progress and has improved in the program. She has been in full compliance of all of the house rules and she has passed all administered drug screens."[11] Mother argued the petition was in J.J.'s best interests because J.J. "is bonded to her biological mother and deserves the chance to thrive in her mother's care." The petition sought six months of reunification services or, in the alternative, placement of J.J. with Mother in a mother-infant program. Mother had been offered a bed in such a program (Solid Foundation) if the court authorized the placement.

On October 23, 2009, on Judicial Council Form, form JV-183 ("Court Order on Form JV-180"), a judicial officer checked a box for the response, "2. The request is

[11] Mother argued the letter refuted the comment in the October 15 Agency report that Mother had violated the program's house rules.

denied because: [¶] . . . [¶] . . . Other (state the specific reason): all of the [attorneys] disagree so set for hearing." The officer also completed section 3 on the form, which provided: "The court orders a hearing on the form JV-180 request because the best interest of the child may be promoted by the request. The hearing will take place on (date): Thursday, October 29 . . . ." A "Notice of Hearing" on "366.26 Hearing, Request to Change Court Order" was sent to the parties.

At the October 29, 2009 hearing, Mother was absent and her counsel requested a continuance. Counsel explained that when she filed the section 388 petition, "[M]other was still doing quite well in the program. As of yesterday, she was remanded into custody with regard to her criminal matter. She was remanded because she had changed programs and she didn't notify the Court of her changing programs. She has a court date of December 1st. [¶] . . . I am asking the Court to continue the entire matter with the exception of the Report and Review to a date after December 1st. She will find out what her status will be, and I will know whether we can go forward on the 388 or not."

Minor's counsel and the Agency conceded a continuance of the section 366.26 hearing was appropriate because Mother had a right to be present, but urged the court to limit the continuance to two weeks. "[Mother] violated part of her drug program, and she's incarcerated and she has to deal with that." Minor's counsel and the Agency also argued there were no changed circumstances justifying another section 388 petition, which they asserted was just a renewal of the petition the court denied in August. Agency counsel contended that "[w]ith respect to the 388, I don't believe that the Court has granted a hearing on the 388 yet," that a prima facie showing had not been made to support the petition, and that the court should deny a hearing on the petition.

The court denied Mother's request for a five-week continuance because "[t]he matter can't be continued in order to ensure that [Mother's] arrest is inappropriate . . . ." The court continued the hearing two weeks to November 12, 2009, and said that "[t]he issue that is raised in this 388 petition will be addressed at that time."

At the November 12, 2009 hearing, which Mother attended, the court first addressed the new section 388 petition. The Agency again asked the court to deny a

hearing on the petition because it failed to show changed circumstances. Mother's counsel asked the court to grant a hearing because if Mother was released from custody on December 1 and allowed to reenter her residential program, she could reunify with J.J. The court ruled, "[B]ased on the fact that the mother is in custody and based also on the inability to provide custody for the mother [*sic*] as to this child, the Court will either deny the 388 petition and/or refuse to address it." (Final brackets in original.) The following colloquy ensued:

"[Mother's Counsel]: Okay. So, your Honor, just for clarification, then are you summarily denying the 388 petition or are you indicating that it could go to hearing on the 388?

"THE COURT: Right now based on the content of this report and based on the record before this Court, the Court will deny the petition.

"[Mother's Counsel]: All right. So you will deny the hearing on the petition is my understanding.

"THE COURT: The Court denies the petition right now on this date.

"[Mother's Counsel]: Okay.

"THE COURT: Based on the record before this Court, it will deny the petition.

"[Mother's Counsel]: Could I just have a quick moment with my client then?

"THE COURT: Sure.

"(Discussion off the record.)

"[Mother's Counsel]: At this time, your Honor, I would offer a stipulation as to the .26 matter. In other words, originally my intention was to have [Mother] testify, but we're prepared to go forward today without testimony, and I would just make a brief . . . statement as to what the mother would testify to had she taken the stand. [¶] . . . [¶] [She] does object to the termination of her parental rights. She very much wants to reunify with her child. She's opposed to any plan of adoption; and if the Court were to continue legal guardianship, she would ask that [J.J.] be placed with her sister . . . ." Minor's Counsel and the Agency said they would accept that stipulation. The court adopted the Agency's recommendations and terminated Mother's parental rights.

1. *Denial of Five-Week Continuance*

Mother argues the court abused its discretion in denying the requested five-week continuance to a date following Mother's scheduled criminal court appearance.

Upon a showing of good cause, the juvenile court may continue a hearing beyond the statutory time limits if the continuance is consistent with the children's interests. (§ 352.) "In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements. [¶] Continuances shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause. Further, *neither a pending criminal prosecution nor family law matter shall be considered in and of itself as good cause*. Whenever any continuance is granted, the facts proven which require the continuance shall be entered upon the minutes of the court." (*Ibid.*, italics added.) The denial of a continuance is reviewed for abuse of discretion. (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 585.)

The court did not abuse its discretion in denying Mother's request for a five-week continuance. Indeed, in light of the statutory language that "a pending criminal prosecution" shall not be considered good cause (§ 352, subd. (a)), the court might well have abused its discretion had it granted the continuance. Even aside from that provision, the court reasonably concluded there was no good cause for the continuance. The "good cause" implicitly invoked was the need to have a determination of the criminal charges in order for the court to consider that result in ruling on Mother's pending section 388 petition. However, for the reasons set forth below, the court reasonably concluded that the petition on its face lacked merit regardless of the outcome of the criminal hearing. Therefore, the court properly avoided further delay and denied a five-week continuance.

2. *The Petition was Summarily Denied*

The parties disagree about whether the court summarily denied the section 388 petition, or whether it granted an evidentiary hearing on the petition but then decided the matter on the written record without allowing Mother to present testimony or cross-examine opposing witnesses. Our review of the record confirms that the court summarily denied the petition.

We acknowledge that the form court order (Judicial Council Forms, form JV-183, issued on October 23 by a different judicial officer) while somewhat ambiguous, strongly suggested that the court had scheduled a hearing on the merits of the petition because it found the petition stated a prima facie case for relief. However, at the November 12, 2009 hearing all parties assumed that either the court had not yet decided whether to hold an evidentiary hearing on the petition or that the court was free to change its mind about whether to hold such a hearing. Minor's counsel and the Agency urged the court to summarily deny the petition, while Mother urged the court to hold a hearing. Mother did not argue that the court had already ordered a hearing held and that that ruling should not be revisited. Therefore, assuming a hearing had actually been scheduled on the 388 petition for November 12, any argument that the court was not free to reconsider was forfeited. (See *In re Erik P.* (2002) 104 Cal.App.4th 395, 403.)

As to the ruling itself, we again acknowledge that the court was somewhat unclear in responding to Mother's questions. However, the court unambiguously stated that it was ruling based on the written record before it and without holding an evidentiary hearing. A fortiori, it summarily denied the petition. Accordingly, we will review its ruling under the higher standard of review applicable to such summary denials.

3. *The Court Did Not Abuse its Discretion in Summarily Denying the Petition*

A section 388 petition "must be liberally construed in favor of its sufficiency. [Citation.] Thus, if the petition presents any evidence that a hearing would promote the best interests of the child, the court must order the hearing. [Citation.] The court may deny the application ex parte only if the petition fails to state a change of circumstance or

new evidence that even might require a change of order or termination of jurisdiction. [Citations.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461, italics omitted.)

Here, the allegations of Mother's October 22, 2009 petition had to be considered in light of the evidence already presented at the August 4 hearing and in light of the entire record of the dependency case. The October petition alleged little if any positive change since the August hearing. Mother was again enrolled in a residential drug treatment program and was participating in services, testing negative for drugs, and complying with her medication regimen. Although she had by this time engaged in treatment for four months rather than just under one month, in the interim she had been expelled from her first program and was required to enroll in a new program, not only demonstrating some form of noncompliance but also necessarily disrupting whatever progress she was making in treatment. She provided no new information about her mental health status or the adequacy of her efforts to treat her mental health problems.

Critically, shortly after the petition was filed, Mother was reincarcerated for failing to comply with the terms of her probation. The hearing on that violation was not scheduled to take place until December 1, 2009. Even assuming the criminal court was prepared to reinstate her probation and allow Mother immediately to re-enroll at Wistar R and R (the most favorable possible outcome), Mother's progress in treatment would have again been disrupted for more than a month (on top of the disruption already caused by her expulsion from Orchid and enrollment in Wistar R and R). Any less favorable outcome would likely cause even greater disruption, and her counsel acknowledged that she would not be able to pursue her section 388 petition under such circumstances.

In sum, the October petition, taken at face value, continued to describe *changing* circumstances that did not hold out a realistic promise of reunification in the near term. Given the seriousness and tenacity of Mother's problems that led to the dependency proceedings (for both J.J. and J.W.), the length of time Mother would still need to successfully treat those persistent problems, the lack of evidence that Mother was on track to meaningfully resolve her mental health and criminality issues, and the relative strength of the bonds J.J. had with Mother and her relative caretaker, the court reasonably

concluded that Mother did not make a prima facie showing that granting her reunification services would promote J.J.'s best interests.

Mother raises no other challenge to the court's order terminating her parental rights. That order is therefore affirmed.

III. DISPOSITION

We affirm the juvenile court's August 4, 2009 order denying Mother's July 10, 2009 section 388 petition; the court's October 29, 2009 denial of Mother's request for a five-week continuance; the court's November 12, 2009 summary denial of Mother's October 22, 2009 section 388 petition; and the trial court's November 12, 2009 order terminating Mother's parental rights.

_____
Bruiniers, J.

We concur:

_____
Jones, P. J.

_____
Simons, J.